RECORD AND BRIEFS

Nos. 16-74, 16-86, 16-258

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IN THE

Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, ET AL.,
Petitioners,

v.

MARIA STAPLETON, ET AL.,
Respondents.

SAINT PETER'S HEALTHCARE SYSTEM, ET AL.,
Petitioners,

v.

LAURENCE KAPLAN,
Respondent.

DIGNITY HEALTH, ET AL.,
Petitioners,

v.

STARLA ROLLINS,
Respondent.

On Writs of Certiorari to the Third, Seventh, and Ninth Circuits

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BRIEF OF *AMICUS CURIAE* PROFESSOR DANIEL I. HALPERIN IN SUPPORT OF RESPONDENTS

DANIEL I. HALPERIN
HARVARD LAW SCHOOL
1563 Massachusetts Ave.
Cambridge, MA 02138
(617) 496-5505
halperin@law.harvard.edu

MARC I. MACHIZ
Counsel of Record
9123 NE Juanita Dr.
Unit 307
Kirkland, WA 98034
(610) 724-4381
mmachiz@gmail.com

Counsel for Amicus Curiae

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QUESTION PRESENTED

The question presented is whether a stand-alone pension plan established by a hospital, controlled by or associated with a church, for its own employees is a church plan, which is exempt from ERISA.

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INTEREST OF THE *AMICUS*

My name is Daniel Halperin.[1] I am the Stanley S. Surrey Professor Emeritus at Harvard Law School. I

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[1] The parties have consented to the filing of all briefs of *amici curiae*. No counsel for a party authored this brief in whole or in part. No person other than the *amicus* or his counsel made a

have worked on retirement income policy for over 50 years in private practice, the government, and as an academic. *See generally* Daniel I. Halperin, *Fifty Years of Pension Law*, 6 DREXEL L. REV. 503 (2014). I was Deputy Assistant Secretary of Treasury for tax policy in 1979 and 1980 when the legislation at issue was adopted.

I am filing this brief because petitioners have quoted a portion of my testimony before the Senate Finance Committee out of context in an effort to establish that the Treasury believed that, as a result of the 1980 legislation, stand-alone church agency plans would be church plans exempt from ERISA. As is clear from the Committee transcripts, this is a misrepresentation of my testimony. *See Kaplan v. Saint Peter's Healthcare System*, 810 F.3d 175, 184 (3d Circ. 2015). My purpose here is to demonstrate why petitioners' assertion is incorrect and to clarify that the Treasury did not and could not have believed that the legislation was attempting to permit any church-affiliated business to establish or maintain an exempt plan for its own employees, merely by creating an internal committee to administer such a plan.

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monetary contribution to its preparation or submission, except that the research, printing, and filing costs for the brief were reimbursed by Harvard Law School's Tax Research Fund. Note that I addressed the same issues in an Expert Report submitted *without compensation* on behalf of Janeen Medina in *Medina v. Catholic Health Initiatives*, Civil Action No. 13-cv-01249-REB-KLM (D. Colorado) to assure that the court in that case was fully apprised of the meaning of my testimony in 1979 and 1980 pertaining to the proposed church plan amendments. I have no direct or indirect financial interest in the outcome of the cases before this Court or any pending or potential case challenging the applicability of the church plan exemption to any employee benefit plan.

SUMMARY OF ARGUMENT

Petitioners have misrepresented my 1979 and 1980 testimony. They have taken my remarks out of context to convey the impression that I was objecting on behalf of the Treasury to the exemption of stand-alone agency plans from ERISA's protections for employees. The reality is that I was only objecting to the continuation of the pre-existing grandfather clause, and that I did not at that time believe the amendments exempted stand-alone agency plans. I continue to believe today that stand-alone agency plans are not exempt from ERISA's protections for their employees.

Petitioners deploy a similar tactic in their statutory interpretation, excerpting language from the amendments. When read in full, the legislation is clearly intended to exempt otherwise-qualifying church plans that are maintained by dedicated pension boards, *not* agency plans maintained by an agency's internal pension committee.

ARGUMENT

I. My 1979 and 1980 remarks have been taken out of context by petitioners and do not support their contention that I and the Treasury thought that the proposed amendments to ERISA were designed or intended to exempt stand-alone agency plans from ERISA.

In 1974, Congress exempted any church plan, described as "a plan established and maintained . . . for its employees . . . by a church," from ERISA. 29 U.S.C. § 1002(33)(A) (1974). Apparently because a number of church plans included employees of church affiliates or agencies, Congress provided a special grandfather rule allowing agencies to continue to participate

in church plans until 1982. 29 U.S.C. § 1002(33)(C) (1974). In 1979, religious groups, including the Church Alliance for the Clarification of ERISA, claimed that the pending expiration of this grandfather clause was unduly disruptive.

Thus, one of the purposes of the 1980 amendments was to make the grandfather clause permanent. To quote the principal sponsor, Senator Talmadge:

> Under current law, both ERISA and the Internal Revenue Code, define [church] plans to include not only church plans covering church employees but also plans covering employees of church-affiliated organizations.
>
> For example, the church plan might cover the employees of a church-related hospital, university or retirement home. As you might expect, this is common practice of many churches throughout the United States. However, unless we act to preserve the longstanding definition of church plans, the law as it currently reads will phase out this definition beginning in 1983.
>
> S. 1090 and S. 1091 make the amendments necessary to continue the current church plan definition.

J.A. 346.

Almost immediately after these remarks, I was asked whether I had any objection to the bill. I then made the statement quoted by petitioners that the Treasury had a serious concern that the bill "would exclude church agencies from the protection of ERISA, and that would mean that if somebody who works for a hospital or school that happens to be affiliated with

a church it would be permissible for that plan to provide no retirement benefits unless they work until age 65, for example." Pet. Br. 39 (quoting J.A. 347). When read in the context of Senator Talmadge's statement, these oral remarks clearly do not support petitioners' claim that I understood the legislation to treat stand-alone agency plans as church plans.

Remember, Senator Talmadge, the sponsor of the legislation, clearly stated the legislation's purpose was to "continue the current church plan definition," allowing church agencies to participate in church plans. I objected, stating that making the grandfather clause permanent would make it permissible to permanently exclude hospital employees from the protection of ERISA. My objection was made with the understanding that, as indicated by Senator Talmadge, the amendment would only exempt a hospital from ERISA if the hospital participated in a plan *established by a church.*

The quotes from my written statement and oral comments at the December 4, 1979 Finance Committee hearing are similarly directed at the extension of the grandfather clause. Petitioners mislead this Court by quoting only the italicized words in the following statements. I said: "These provisions would *substantially expand the concept of a church plan* and by allowing church agencies to be included in church plans would effectively make the temporary rule contained in current law permanent." I further said: "Therefore we oppose the provision of S.1091 which would extend the temporary rule relating to church agencies and which would *prevent the full requirements of ERISA from applying to church agency plans.*" *Compare Hearings Before the Subcomm. on Private Pension Plans and Emp. Fringe Benefits of the*

Senate Committee on Finance, 96th Cong., 1st Sess. 223 (1979) [hereinafter *Hearings*] (statement of Daniel I. Halperin, Deputy Assistant Secretary for Tax Policy, Department of the Treasury), *with* Pet. Br. 38.

Petitioners strategically excerpted my statements to create the false impression that in 1979 I was battling an attempt to permit church-affiliated businesses like hospitals and schools to establish and maintain ERISA exempt church plans for their own employees. But by merely opposing the extension of the grandfather clause, I did no such thing.

In short, my remarks at both the 1979 hearing and the 1980 markup must be understood as an objection to the goal that had been stated by Senator Talmadge, namely the permanent extension of the grandfather clause, which allowed an agency to participate in a plan established and maintained by a church. Senator Talmadge did not ask for an exemption for stand-alone agency plans. Therefore, it makes no sense to read my statements as addressing stand-alone plans at all. If I had believed, as petitioners claim I did, that the proposed legislation was intended to allow stand-alone agency plans, for the first time, to be considered church plans, it is inconceivable that I would not have made the Treasury's objection to such an effort more explicit.

II. The statutory language does not support the exemption of stand-alone agency plans.

Looking at the statutory language does not change my conclusion that the 1980 legislation had nothing to do with stand-alone plans. In 1980, Congress expanded the definition of a church plan so that:

> A plan established and maintained . . . for its employees . . . by a church includes a plan

> *maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits* . . . if such organization is controlled by or associated with a church.

29 U.S.C. § 1002(33)(C)(i) (emphasis added).

This case turns on the meaning of this provision, in particular—despite what petitioners would have you believe—the words in italics. Pet. Br. 23. Again to quote Senator Talmadge at the 1980 markup:

> S. 1090 and S. 1091 make the amendments necessary to continue the current church plan definition. The definition would also be expanded to include church plans which rather than being maintained directly by a church are instead *maintained by a pension board maintained by a church.*

J.A. 346 (emphasis added).

In other words, the proposed legislation would continue the definition under the grandfather clause (as noted above) and expand it to include plans maintained by a church pension board. Nothing more. I understood, as I testified to the Subcommittee on December 4, 1979, that the provision as amended in 29 U.S.C. § 1002(33)(C)(i) was intended *only* to "allow a program of a church pension board to be considered a church plan." *Hearings* at 222. As so limited, the Treasury raised no objection to this provision.

The hospital plans in question are clearly not maintained by a pension board. However, in its 1982 ruling, the Internal Revenue Service, without any analysis of

the purpose of the provision, inexplicably determined that an administrative committee composed of an agency's own employees qualifies under section (33)(C)(i) as an "organization the principal purpose or function of which is the administration . . . of a plan or program for the provision of retirement benefits . . . for . . . employees." IRS GCM 39,007, 1983 WL 197946 (Nov. 2, 1982).

To fit this theory within the words of the law as it was enacted, it becomes essential for petitioners to make a two-part argument. First, petitioners must argue that the hospital's retirement plan is "maintained" by the hospital's own retirement committee. Second, petitioners must argue that that internal committee has as its principal purpose or function the "administration" of the plan. So interpreted, the statutory requirement of an entity "the principal purpose or function of which is the administration or funding of a plan" is meaningless. Virtually every single-employer retirement plan is administered by such a committee, and so virtually every single-employer retirement plan would therefore meet the principal purpose requirement. The only meaningful requirement for church plan status would then be that the employer be "controlled by or associated with a church or a convention or association of churches." 29 U.S.C. § 1002(33)(C)(i).

Moreover, neither petitioners nor the solicitor general make any effort to defend the claim that a principal purpose organization can include an administrative committee appointed and controlled by the employer. Petitioners refer to the relevant provision on at least a half dozen separate occasions in the text of their brief but in all but one the words "organization the principal purpose or function of which is the administration . . . of a plan or program for the provision

of retirement benefits . . . for employees" are omitted. In fact, they state that the definition of church plan "simplified *to exclude language not at issue here*, reads: 'The term "church plan" means [1] a plan maintained by a [church-affiliated] organization [2] which is exempt from tax.'" Pet. Br. 23–24 (emphasis added).

The omission of the principal purpose language from the "simplified" definition petitioners put forward underscores the weakness in their argument. If the purpose of the provision was to allow stand-alone plans adopted by a hospital solely for its employees to be considered a church plan, the statute could, as petitioners suggest, have read "a plan established and maintained . . . by a church . . . includ[ing] a plan maintained by an organization [that is] controlled by or associated with a church." Pet. Br. 2 (first, second, and fourth alterations in original). Since any employer can appoint a committee to administer a plan, under petitioners' interpretation, the excluded words add nothing to the statutory requirements.

But in fact, the excluded language is relevant because it shows that only *certain* affiliated organizations, namely *pension boards or equivalent organizations*, could maintain church plans (in addition to churches themselves). To use the words of petitioners, this is the only interpretation that avoids "surplusage." Pet. Br. 17, 24, 25, 28. As they say, it is a cardinal principle of statutory construction that courts must give effect if possible to every clause and word of a statute.

This interpretation also produces a coherent result. The Internal Revenue Code gives deference to churches, as opposed to all religiously affiliated organizations.[2]

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[2] For example, the Internal Revenue Code limits audits of churches, but not other religiously affiliated organizations. I.R.C.

History shows that, consistent with this deference, Congress originally intended to permanently exempt only church plans for employees of churches. As the solicitor general points out, "Congress exempted 'church plans,' in part because 'the examination of books and records' required under ERISA 'might be regarded as an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to *churches and their religious activities*.'" S.G. Br. 3 (emphasis added) (quoting S. Rep. No. 383, 93d Cong., 1st Sess. 81 (1973)). The 1980 amendments were a response to the claim that church plans historically covered employees of church agencies as well and it would be disruptive to split these into two separate plans. It also extended the exemption to church plans administered by pension boards. That is all Congress intended.

At least two of the plans before the Court did not claim to be exempt from ERISA at the time they were formed. Pet. Br. 13 (St. Peter's), 15 (Dignity Health). This suggests that, at the time, all parties understood that the 1980 amendments were *not* intended to exempt stand-alone agency plans.

If a non-church entity like a hospital (with the principal purpose of providing healthcare) cannot itself maintain a "church plan," it makes no sense that a plan "maintained" by an internal committee appointed by that hospital qualifies as a church plan. There is

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§ 7611 (2012); *see also* I.R.C. § 7611(h)(1) (2012) (defining "church"). Similarly, "churches, their integrated auxiliaries, and conventions or associations of churches" are exempt from filing annual tax returns, while religiously affiliated organizations are not. I.R.C. § 6033(a)(1)(3) (2012). Church-affiliated hospitals are specifically cited as an example of a type of organization not covered by this exemption. 26 C.F.R. § 1.6033-2(h)(7) ex. 3 (2015).

no reason to exempt stand-alone plans established by hospitals with a church affiliation while continuing to subject other hospitals to ERISA, and no reason to believe that Congress intended to do so.[3]

CONCLUSION

When read in context, neither my remarks nor the statutory language itself support petitioners' interpretation that stand-alone agency plans are exempt from ERISA.

Respectfully submitted,

DANIEL I. HALPERIN
HARVARD LAW SCHOOL
1563 Massachusetts Ave.
Cambridge, MA 02138
(617) 496-5505
halperin@law.harvard.edu

MARC I. MACHIZ
Counsel of Record
9123 NE Juanita Dr.
Unit 307
Kirkland, WA 98034
(610) 724-4381
mmachiz@gmail.com

Counsel for Amicus Curiae

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[3] This brief does not address the argument advanced by Respondents and relied on by the courts below that only a Church can establish a church plan, regardless of what sort of entity may maintain a church plan. Nothing in the brief should be read as either implicitly or explicitly disagreeing with Respondents' argument.